

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Midland Capital Corp. :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Years 1969 & 1973. :  
\_\_\_\_\_

State of New York  
County of Albany

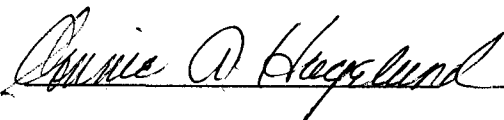
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of August, 1981, he served the within notice of Decision by certified mail upon Midland Capital Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

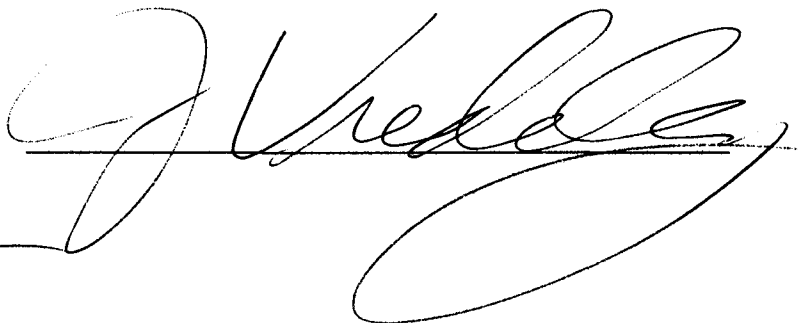
Midland Capital Corp.  
110 William St.  
New York, NY 10038

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
14th day of August, 1981.

  
\_\_\_\_\_  
Connie D. Haglund

  
\_\_\_\_\_

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition  
of  
Midland Capital Corp.

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision  
of a Determination or a Refund of Corporation  
Franchise Tax under Article 9A of the Tax Law for  
the Years 1969 & 1973.

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 14th day of August, 1981, he served the within notice of Decision by certified mail upon Alan Greene the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alan Greene  
Price, Waterhouse & Co.  
153 East 53rd Street  
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
14th day of August, 1981.

*Connie R. Hegeland*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

August 14, 1981

Midland Capital Corp.  
110 William St.  
New York, NY 10038

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Alan Greene  
Price, Waterhouse & Co.  
153 East 53rd Street  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
MIDLAND CAPITAL CORPORATION	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Franchise Tax on Business	:	
Corporations under Article 9-A of the Tax	:	
Law for the Years 1969 and 1973.	:	

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Petitioner, Midland Capital Corporation, 110 William Street, New York, New York 10038, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the years 1969 and 1973 (File Nos. 16743 and 16748).

A formal hearing was held before Herbert Carr, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 15, 1979 at 2:50 P.M. Petitioner appeared by Price, Waterhouse & Co. (Alan Greene, CPA). The Audit Division appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUE

Whether petitioner, a regulated investment company, is entitled to a 1969 net operating loss deduction, based upon a net operating loss sustained in 1972.

FINDINGS OF FACT

1. Petitioner, Midland Capital Corporation, is a domestic corporation.
2. Petitioner timely filed a claim for credit or refund of \$17,157.91 on January 22, 1976, which was denied by the Audit Division of the Department of

Taxation and Finance. The claim was predicated upon petitioner's assertion of a net operating loss sustained in 1972 which it sought to carry back to 1969.

3. Petitioner filed an election to be taxed as a regulated investment company, pursuant to section 851, et seq. of the Internal Revenue Code, for the year 1969. It did not file such an election for 1972.

4. The petition with respect to 1973 is deemed withdrawn.

5. Petitioner sustained a net operating loss for Federal tax purposes of \$263,785 for the year 1972.

#### CONCLUSIONS OF LAW

A. That for purposes of the franchise tax on business corporations, "entire net income" is defined by subdivision 9 of section 208 of the Tax Law as total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report (or would be required to report if it had not made a subchapter s election) to the Internal Revenue Service.

The regulation in force for the year at issue provided that "Federal taxable income", as defined by section 63 of the Internal Revenue Code and not any special type of income such as investment company taxable income, was the starting point for computation of entire net income. Former 20 NYCRR 3.11.

B. That section 208.9(f) permits the corporate taxpayer a net operating loss deduction in computing entire net income, as follows:

"A net operating loss deduction shall be allowed which shall be presumably the same as the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code of nineteen hundred fifty-four, or which would have been allowed if the taxpayer had not made an election under subchapter s of chapter one of the internal revenue code, except that (1) any net operating loss included in determining such deduction shall be adjusted to reflect the inclusions and exclusions from entire net income required by paragraphs (a), (b) and (g) hereof, (2) such deduction shall not include any net operating loss sustained during any taxable year

beginning prior to January first, nineteen hundred sixty-one, or during any taxable year in which the taxpayer was not subject to the tax imposed by this article, and (3) such deduction shall not exceed the deduction for the taxable year allowable under section one hundred seventy-two of the internal revenue code of nineteen hundred fifty-four, or the deduction for the taxable year which would have been allowable if the taxpayer had not made an election under subchapter s of chapter one of the internal revenue code;".

The third clause of the above-quoted paragraph has consistently been interpreted by the State Tax Commission as limiting the amount of the New York net operating loss deduction to that amount actually absorbed for Federal purposes in the taxable year (or, where applicable, to that portion of the deduction necessary to reduce entire Federal taxable income to zero). Matter of Telmar Communications Corp., State Tax Comm., June 20, 1974; Matter of Savin Business Machines Corp., State Tax Comm., March 24, 1970; Matter of Hi-Lo Food Centers, Inc., State Tax Comm., March 9, 1970; Matter of Spedcor Electronics, Inc., State Tax Comm., March 9, 1970; Matter of Vision Associates, Inc., State Tax Comm., March 9, 1970; Matter of Allied Fence, Inc., State Tax Comm. Advisory Opinion, June 11, 1980, TSB-H-80(11)C.

C. That section 852(b)(2) of the Internal Revenue Code provides in pertinent part:

"The investment company taxable income shall be the taxable income of the regulated investment company adjusted as follows:

\* \* \*

"(B) The net operating loss deduction provided in section 172 shall not be allowed."

D. That Chapter 500 of the Laws of 1979, effective July 5, 1979, granted to the regulated investment company the tax advantages available to it under section 852 of the Internal Revenue Code (e.g., the deduction for dividends paid to shareholders) and specifically denied to the regulated investment

company the New York net operating loss deduction, in conformity with Federal law.

"For any taxable year, beginning on or after January first, nineteen hundred eighty of a regulated investment company, as defined in section eight hundred fifty-one of the Internal Revenue Code of nineteen hundred fifty-four, in which such company is subject to federal income taxation under section eight hundred fifty-two of such code, such company shall be subject to a tax computed under either clause one or four of paragraph (a) of subdivision one of section two hundred ten of this chapter, whichever is greater, and shall not be subject to any tax under article thirty-two of this chapter. In the case of such a company the term 'entire net income' means 'investment company taxable income' as defined in paragraph two of subdivision (b) of section eight hundred fifty-two, as modified by section eight hundred fifty-five, of the internal revenue code of nineteen hundred fifty-four plus the amount taxable under paragraph three of subdivision (b) of section eight hundred fifty-two of such code subject to the modification required by subdivision nine of section two hundred eight of this chapter, other than the modification required by clause two of paragraph (a) and by paragraph (f) thereof, including the modification required by paragraphs (d) and (e) of subdivision three of section two hundred ten of this chapter." Tax Law section 209.7.

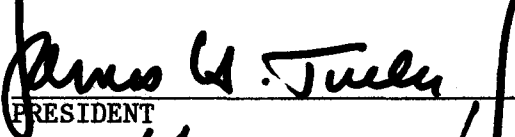
E. That except as specifically provided in New York statutes, net income must be computed in accordance with the definitions and dictates of the Internal Revenue Code. During the year at issue, the regulated investment company was prohibited by Federal law from availing itself of a deduction for net operating losses. Insofar as the net operating loss sustained by petitioner in 1972 was not utilized as a carryback to 1969 for Federal purposes, such loss may not be utilized as a carryback to 1969 for state purposes. See Matter of Hemisphere Fund, Inc., State Tax Comm., January 30, 1981. Petitioner's argument that it was deprived of any tax benefit from its loss rests upon equitable grounds and was addressed, in substance, by the Supreme Court in United States v. Foster Lumber Co., 429 U.S. 32, 43-44 (1976).

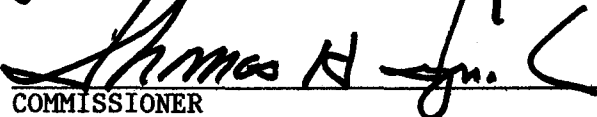
F. That the petition of Midland Capital Corporation is hereby denied.

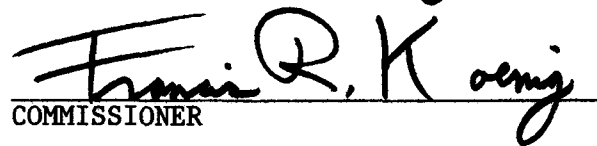
DATED: Albany, New York

AUG 14 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER